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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 323

J. D. MCCARTY,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on the 7th day of April, 1969. Petition for rehearing was denied on the 5th day of June, 1969.

OPINION BELOW

The opinion of the court below is not yet known to be reported, but is appended hereto in Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review by Writ of Certiorari the order of the United States Court of Appeals is believed to be conferred

by 48 U. S. Statutes, 926, and which states, in its pertinent part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods (a) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED

1. Whether an instruction on the presumption or inference of criminal intent is a denial of due process in a tax-fraud case where there is only proof of a deficiency, and no proof of any act which is inconsistent with honest mistake, inadvertence, or carelessness.

2. Whether a conviction for perjury based upon the signing of a tax return in which there was an under reporting of income is a violation of the privilege against self-incrimination, where there is no independent evidence to support the offense of perjury.

3. Whether this Supreme Court should review the 1897 case of *Agnew* v. *United States* in the light of modern constitutional standards and established guidelines for the lower Federal Courts in regard to the judicially-allowed presumption or inference of criminal intent.

4. Whether the instruction:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> "So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may

draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused.

"Unless otherwise instructed, in determining the issues of intent, the jury is entitled to consider any statement made or acts done or omited by the accused and all facts and circumstances in evidence in this case which may aid the determination of the state of mind of the accused."

when given in a tax-fraud case where there is a total lack of strong evidence of guilt, and where there is a mere understatement of income accompanied by acts which are consistent with honest mistake, inadvertence and carelessness, causes the burden of proof to shift to the accused to establish his innocence.

5. Whether the various Circuit Courts of Appeals are in conflict in their use of the instruction on presumption of intent, such as to require this Supreme Court to establish consistency between them.

STATEMENT OF CASE

Public Service

The defendant in this case, J. D. McCarty, has been a member of the House of Representatives, serving in the Oklahoma Legislature since 1941. J. D. McCarty was three times elected as Speaker of the House of Representatives of the State of Oklahoma by the members of the Legislature. This set a historical precedent insofar as the confidence placed in J. D. McCarty by the members of the Legislature.

Insurance Agency

Immediately after World War II, J. D. McCarty commenced his own insurance agency which consisted of fire and casualty business serving the general public and small businesses. J. D. McCarty maintained a sole proprietorship until October 1, 1962, when a corporation was formed for the insurance agency and at that time new bookkeeping methods were commenced for the operation of the business due to its growth and expanded volume of business.

Books and Records

J. D. McCarty maintained an adequate set of records at the time he commenced his business, which consisted of the following items:

1. An Accounts Receivable Ledger;
2. A bank account;
3. Deposit Slips;
4. Check Stubs;
5. Cancelled Checks; and
6. A file folder containing the accounts current from each of the companies that J. D. McCarty was an agent for.

J. D. McCarty further, upon the receipt of the Bank Statement, would scotch-tape his cancelled checks to the stubs so that for all of the years that he had his insurance agency, all of the cancelled checks were scotch-taped to the check stubs. This unusual and yet simple method of bank reconciliation and expenditure reconciliation was used by the taxpayer, J. D. McCarty, until the corporation was formed in October, 1962.

The office force of J. D. McCarty consisted of two young girls, one of whom was inexperienced in the insurance agency business and was in training actually to be an underwriter. This was Lu Ann Reagan. Lu Ann Reagan prepared certain documents, including the insurance policies and the billings for the insurance policies and, on isolated instances, prepared the bank deposit slips and for the years involved, assisted in gathering information from the company files for the preparation of the income tax return. The other girl in the office was a young girl by the name of Betty Christian, who was inexperienced as a bookkeeper, and it was her job and her duty to keep the books and records of the company, make the deposits and record the proper entry on the accounts receivable ledger that the taxpayer kept in his office. This girl assisted in preparation of the material for the 1962 tax return which was prepared and to be filed representing the insurance income for the first nine months of 1962 because the corporation was formed October 1, 1962, and it was the intent and purpose in forming the corporation to transfer all income to the corporation.

Examination of Records by Internal Revenue Service

The records of J. D. McCarty were constantly examined and scrutinized by the Internal Revenue Service and none of the reports disclosed any required bookkeeping changes, negligence penalties, or recommendations for fraud penalties. In May of 1961, the Internal Revenue Agent completed the audit for the year 1959, and a small adjustment for additional income tax was made by the Agent and agreed to by the taxpayer, J. D. McCarty.

The next occurrence of an Internal Revenue Agent in the office of J. D. McCarty was in December of 1965, when an Agent by the name of Maynard appeared with a Special Agent by the name of Vedder. These two Agents had not previously performed any work in the office of J. D. McCarty, nor had Revenue Agent Maynard previously worked on the McCarty books and records. The Agents presented themselves and stated that it was their duty and their job to attempt to prove tax evasion on the part of J. D. McCarty.

The Agents were allowed to spend over 2,000 hours on this particular case (R. 421) and at the trial testified that J. D. McCarty submitted his income-tax returns on the accrual method of accounting rather than on the cash method, which caused him to pay taxes in advance of the actual receipt of the money. That is, he paid taxes on policies that were written but for which he had not collected a premium. This was, in effect, a double penalty because he not only had to pay income tax on his uncollected accounts but, to keep the insurance in force, it was necessary that he remit to the insurance companies the amount due them for the insurance policies represented by the accounts receivable.

The evidence at the trial disclosed that, by reason of the service of J. D. McCarty in the House of Representatives and his added responsibilities as Speaker of the House, he was absent from his office at least 80 per cent of the time during which time, two government Agents were examining the books and records of the taxpayer in his office. The evidence further disclosed that the Agents were never refused any books or records or information during

the examination and had the full cooperation of J. D. McCarty at all times (R. 437-5).

The trial of the case disclosed that all of the transactions involved were properly recorded on the books and records and traced through the bank account of J. D. McCarty and that there was only one set of books and only one bank account and that there was not one single act of fraud or concealment and not one single asset concealed and there were no fictitious books or records.

In fact, several of the Department of Justice's witnesses, testifying under oath, testified concerning the excellent character and reputation of J. D. McCarty.

The Department of Justice's final witness was the Revenue Agent who examined the books and records of the taxpayer and spent 2,000 hours doing so. This witness testified to all of the above facts and did not testify to one act of fraud on the part of J. D. McCarty nor did he testify to any circumstances from which evil intent or willfulness might even be inferred.

The defense in this case was that J. D. McCarty, by reason of his unusually busy schedule and public service, together with the growth of his insurance business, had made natural and usual mistakes in the preparation of his tax returns. That these mistakes were usual and customary and were mistakes that any Revenue Agent finds daily in the performance of his duties. It must be borne in mind that the Internal Revenue Service, in every case where it finds additional tax due, finds as a necessary part thereof additional income. Therefore, it is necessary for them in this case to prove the allegations charged in the Complaint,

to-wit: false and fraudulent statement and an intent to willfully evade taxes. How can this be said, or even inferred, when the bank records and deposit slips record each and every transaction and the books and records, as maintained by the taxpayer, are sufficient for the preparation of a tax return?

Trial Proceedings

The defendant J. D. McCarty was indicted on three (3) Counts of intent to willfully evade and defeat his income-tax liability by filing a false and fraudulent tax return for the years 1960, 1961 and 1962. Three (3) additional charges were filed alleging that J. D. McCarty made a false oath with each tax return and further alleging that they were knowingly made by the defendant J. D. McCarty when he knew the facts contained in said returns were untrue.

The Department of Justice attempted to prove the first three (3) Counts of its Indictment by offering proof under the net worth method. The Department of Justice had numerous witnesses testify in the case concerning assets purchased by J. D. McCarty *and* for payments made to J. D. McCarty, but all of the witnesses also testified that the transactions were usual and normal business transactions; that there was nothing unusual about them.

All of the transactions were properly reflected on the books and records maintained by J. D. McCarty; there was not one item of money received by the defendant J. D. McCarty, which was not properly shown on the deposit ticket and deposited in his one bank account maintained for this purpose (R. 452).

The Revenue Agent who made the examination for the Department of Justice did not testify to one single act of fraud on the part of J. D. McCarty and he did testify that the tax return could be prepared from the books and records of J. D. McCarty.

Mr. Maynard (R. 452) and both of J. D. McCarty's Certified Public Accountants, testified that all of the items of income were properly shown on bank deposit slips and properly deposited in the bank account. That the mistake occurred when the taxpayer J. D. McCarty in the year 1962, formed a corporation in October and was attempting to file a tax return reflecting nine months' income from his insurance business.

The inexperienced employees of J. D. McCarty, together with his busy schedule, contributed to the mistake in not reporting the full amount of income received.

This trial commenced on July 17, 1967, and a jury verdict in the case was reached six days later with a finding by the jury of guilty as to Count 3 of the Indictment and guilty as to Count 6 of the Indictment. J. D. McCarty was found guilty for the year 1962 only, and not guilty as to the years 1960 and 1961, which were Counts 1 and 2, and 4 and 5 of the original Indictment as filed by the United States Department of Justice.

The court, after overruling the motions of J. D. McCarty for a new trial, and notice of appeal having been properly given, the court sentenced J. D. McCarty to three (3) years in the custody of the Attorney General and a three-year suspended sentence thereafter. From this judgment and verdict by the court, this appellant appealed to the Court of Appeals for the Tenth Circuit, which affirmed the conviction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

68A United States Statutes 851 (26 U.S.C.A. 720):

"ATTEMPT TO EVADE OR DEFEAT TAX

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

68A United States Statutes 852(1) (26 U.S.C.A. 7206(1)):

"FRAUD AND FALSE STATEMENTS

"Any person who—

"(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * *."

REASONS FOR GRANTING THE WRIT

I

During the course of J. D. McCarty's trial, the court instructed the jury as follows (R. 872):

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> "So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused."

An instruction of this type seems to have first come before the Supreme Court of the United States in the case of *Agnew* v. *United States*, 17 S.Ct. 235, in the year 1897, but appears not to have been before it since. An instruction of this type has been frequently referred to as an "Agnew Charge" and its legal propriety has been discussed and passed upon by the Courts of Appeals of at least the 2nd, 5th, 6th, 7th, 8th, 9th and 10th Circuits, since the year 1897. The cases primarily involve the criminal offenses of mail fraud, tax fraud and the passing or uttering of a counterfeit. The one common denominator which pervades these offenses and which relates to the "Agnew Charge" is the element of proving a criminal intent by an act or omission of the defendant. Some of these cases have ap-

proved one form or another of the "Agnew Charge," while others have held its use to have been erroneous.

In summarily sweeping aside the petitioner's contention that this instruction shifted the burden of proof to him to prove his innocence and thereby deprived him of due process of law, the Court of Appeals made the following comment:

> "Such a charge standing alone has been criticized[1] not without some justification as confusing, clumsy, or unnecessary, if not prejudicial, in other cases held to constitute reversible error,[2] and in another case deemed plain error.[3] When taken in context with an entire charge, however, most courts,[4] including this one,[5]

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[1] United States v. Releford, 352 F.2d 36 (6th Cir. 1965), *cert. denied,* 382 U.S. 984, 86 S.Ct. 562, ... L.Ed.2d ..... (1966); United States v. Denton, 336 F.2d 785 (6th Cir. 1964); Imholte v. United States, 226 F.2d 585 (8th Cir. 1955); Moore v. United States, 375 F.2d 877 (8th Cir. 1967).

[2] United States v. Barash, 365 F.2d 395 (2d Cir. 1966); Berkovitz v. United States, 213 F.2d 468 (5th Cir. 1954); Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953); Bloch v. United States, 221 F.2d 786 (9th Cir. 1955). *Cf.* Hibbard v. United States, 172 F. 66 (7th Cir. 1909).

[3] Mann v. United States, 319 F.2d 404 (5th Cir. 1963). *But Cf.* Helms v. United States, 340 F.2d 15 (5th Cir. 1964).

[4] Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897); Estes v. United States, 335 F. 2d 609 (5th Cir. 1964); United States v. Denton, 336 F.2d 785 (6th Cir. 1964); Sherwin v. United States, 320 F.2d 137 (9th Cir. 1963), *cert. denied,* 375 U.S. 964, 84 S.Ct. 481, 11 L.Ed.2d 420, *rehearing denied,* 376 U.S. 946, 84 S.Ct. 796, 11 L.Ed.2d 771 (1964); United States v. Wilkins, 385 F.2d 465 (4th Cir. 1967); United States v. Littlejohn, 96 F.2d 368 (7th Cir. 1938).

[5] United States of America v. Tijerina et al., ... F.2d ..... (10th Cir. 1969); Elbel v. United States, 364 F.2d 127 (10th Cir. 1966); Roper v. United States, 54 F.2d 845 (10th Cir. 1931); cf. Laws v. United States, 66 F.2d 870 (10th Cir. 1933).

which have considered the question, have accepted its principle as involving a mere rule of circumstantial evidence not inconsistent with the burden of the government and the doctrine of reasonable doubt, or at worst, as not constituting prejudicial error considering the instructions as a whole."

The instruction which was approved by this Supreme Court in *Agnew* v. *United States, supra,* was given to the jury as:

"The rule of law in regards to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value, and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank; but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presumption throws the burden of proof upon the defendant; and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you, beyond a reasonable doubt, that there was no such guilty intent in such transaction."

The Court's attention is directed to the fact that the above instruction very carefully, and in guarded language, includes the following things:

1. States that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal,
2. Tells the jury that it should determine whether the accused did knowingly and willfully commit illegal acts, and that,
3. If the jury finds such illegal acts were done, it must infer intent to defraud, but, that
4. This inference is evidentiary in nature and not conclusive and may be overcome by other evidence which creates a reasonable doubt as to its correctness, and
5. Points out the specific evidence which might be considered by the jury in arriving at an inference of intent (*i.e.*, the placing of worthless securities among the bank's assets *at a greatly exaggerated value* and crediting that exaggerated amount to his personal account).

Further, in *Agnew* v. *United States, supra,* this Supreme Court, in commenting on the instructions as a whole, stated:

> "For the jury were further advised that, if they found the facts in question, which were again rehearsed, then the necessary inference was that the transaction was effected 'with intent to injure and defraud said bank, and such inference can only be overcome by evidence satisfactory to you that there was no such intent'; that 'the question of the intent is to be determined by the facts and circumstances, and that the surroundings at the time of the transaction'; that 'the intent of the defendant at the time he committed the transaction is the question for you to determine, and, in arriving at a conclusion on that intent, you will carefully weigh all of the testimony

in the case'; that the presumption of innocence remains with the defendant until the jury are 'satisfied of the guilt beyond a reasonable doubt'; and that, 'if you are satisfied, beyond a reasonable doubt, that the transactions as charged were committed, and at the time he committed those transactions he had an intent to defraud the bank, your verdict will be one of guilty.' Unless you are satisfied beyond a reasonable doubt, that he had such intent, your verdict will be not guilty."

Since the year 1897, when this Court approved the "Agnew" instruction for use in presumption of intent from the doing of a wrongful, fraudulent or illegal act, the various Circuit Courts of Appeals have evolved divergent lines of decisional authority.

The most divergent views which presently exist are those of the Fifth and Tenth Circuits. In the recent tax-fraud case of *Mann* v. *United States* (5th Cir), 319 F.2d 404, the Fifth Circuit Court of Appeals held an instruction almost identical[6] to the instruction given in McCarty, to be plain error. In the *Mann* case, as in the *McCarty* case, there was only a proved deficiency and no specific act of fraud or concealment which is inconsisent with honest mistake. In the *Mann* case, the instruction was found to have shifted the burden of proof, while in the *McCarty* case, it

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[6] The instruction given in *Mann* was:

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused."

was held not just harmless, but even to be very CIRCUMSPECT.

The most rational basis for instructing a jury that it may infer or presume criminal intent, is characterized by those decisions which reason that:

> "The color of the act determines the complection of the intent."

This was even quoted as the proper criteria by the Tenth Circuit Court of Appeals in its 1931 decision of *Roper* v. *United States*, 54 F.2d 845. Also, in *Roper*, the Tenth Circuit Court was careful to point out to the jury the specific acts of the accused which could be considered in arriving at any presumption or inference, while in the *McCarty* case the same court delineated no specific acts, but rather, leaves it to the jury to find and determine any acts which bespeak of evil intent and from which intent may be presumed.

It is thus seen that not only is the Tenth Circuit Court of Appeals out of harmony with other Circuit Courts in its views in *McCarty*, but it is out of harmony with its own previous decisions.

In the recent case of *Leary* v. *United States*, 89 S.Ct. 1532, this Supreme Court reviewed the propriety of criminal statutory presumptions and announced therein the following general proposition at page 1548:

> "[15, 16] The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'aribtrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more

likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily."

This Court further stated in *Leary* v. *United States*, at page 1546:

> "The Court, relying upon a prior decision in a civil case,[58] held that the 'controlling' test for determining the validity of a statutory presumption was 'that there be a rational connection between the fact proved and the fact presumed.' 319 U.S., at 467, 63 S.Ct., at 1245. The Court stated:[7]
>
> > 'Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.' 319 U.S., at 467-463, 63 S.Ct., at 1245. (footnotes omitted.)"

The essence of the result in the instant case is that the jury was permitted to presume intent when it was not instructed to first find facts which had a rational connection with the intent to be presumed. In fact, the admonition contained in the instruction:

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[7] Footnote 58 in Leary v. United States reads: Mobile, J & K C.R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910).

> "So unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended, etc."

is a license to the jury to start out with the presumption of intent and then look for facts to overcome it. This is a shifting of the burden of proof and a denial of due process of law.

II

In its opinion, the Tenth Circuit Court of Appeals concludes that the petitioner waived any deficiencies which existed in the instructions short of fundamental error.

In the Motion for Judgment of Acquittal or in the alternative Motion for New Trial (which appears in Appendix C), it was urged to the District Court that the instruction on inference of intent had shifted the burden of proof and thereby deprived the petitioner of due process of law. At earlier stages in the trial proceedings, petitioner's counsel urged that the Government had failed to make a *prima facie* case for conviction and had only proved that a deficiency existed. Furthermore, in its opinion, the Tenth Circuit Court of Appeals considered the merits of the petitioner's claim of the instructions' unconstitutionality.

In *Leary* v. *United States,* supra, this Court reviewed an instruction on statutory presumption of intent and to which no objection had been made. And here, as in *Leary,* the trial court was urged by the accused to direct a verdict for petitioner at the close of the Government's case. This was urged on the ground that the prosecution had failed to prove acts of fraud sufficient to support a conviction. In

the brief and at the argument in support of either acquittal or a new trial, the petitioner urged that the instruction on presumption of intent was a denial of due process. This question was therefore properly placed before the District Court and its merits ruled upon by the Court of Appeals, thus making it a proper subject of inquiry for this Supreme Court.

In *Leary*, it was stated at page 1546:

> "[14] It is true that petitioner did not object to the jury instructions on the basis of the presumption's alleged unconstitutionality. However, he did rely upon that ground in his previous motion for a directed verdict at the close of the prosecution's case and urged it again in his subsequent motion for a new trial. Both motions were denied. The Court of Appeals considered petitioner's constitutional argument on the merits, and rejected it. See 383 F.2d, at 868-870. In these circumstances, we conclude that the question is properly before us." (Footnotes omitted.)

III

The petitioner's conviction for perjury was predicated and premised upon the signing of a tax return which underreported income. The legal conclusion which must be drawn therefrom is that the signing of a false and fraudulent tax return, by the act and admission of the accused himself, is, *per se*, perjury.

Such a conclusion is necessary since there is no requirement for independent evidence to support the charge of perjury.

This is a violation of the privilege against self-incrimination and is prohibited. It is, further, a denial of due

process, inasmuch as a conviction for defeating and evading the payment of the tax, allows the conviction for perjury to naturally follow without independent proof that knowledge of any falsity of the return existed at the time of its signing.

The charge given on presumption or inference of intent was given as to both the perjury count and the evasion count. The contentions of the petitioner are exactly parallel to those made in the case of *Mann* v. *United States* (5th Cir., 1963), 319 F.2d 404, and with respect to them, the Court stated at page 409 of that opinion:

> "[3] The quoted charge is subject to another vice. The statute involved, 26 U.S.C.A. § 7201, specifically provides that the crime of income tax evasion must be accompanied by a specific intent on the part of the accused to defeat or evade the tax, which must be proved by independent evidence. Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann and with like knowledge, would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself wilfully attempted to evade or defeat the tax. The following charge was condemned in Chappell v. United States, 9 Cir., 1959, 270 F.2d 274.
>
> 'Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against the United States charged in the indictment. In this connection, you are instructed that every person is

presumed to intend the natural consequences of his own voluntary and deliberate acts. One who voluntarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result."

The court held that the quoted charge conflicted with the overriding presumption of innocence with which the accused is endowed under the law.

"Our attention is called to the case of Bernstein v. United States, 5 Cir., 1956, 234 F.2d 475, in which it was said that every charge of a presumption other than that of innocence is not reversible error in a criminal trial. It is not our holding that every charge using the word 'presumption' is reversible error. We do hold that it is error to give a charge in a criminal case of this nature, the overall effect of which is to place a burden upon the defendant to produce evidence to overcome a presumption of guilt.

"[4, 5] We are not unmindful of the case of Legatos v. United States, 9 Cir., 1955, 222 F.2d 678, and Windisch v. United States, supra, which hold that when a charge as a whole fairly gives the law to the jury on the necessity of wilfulness in an income tax evasion case, that one isolated part of the charge that a person is presumed to intend the natural consequences of his acts, does not constitute prejudicial error. Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one. Perez v. United States, 5 Cir., 1961, 297 F.2d 12.

"[6] Counsel for Dr. Mann did not object to the charge as required by Rule 30 F.R.Crim.P. The sole defense of Dr. Mann was his contention that he did not intend to evade or defeat, the tax imposed; and he denied that his conduct was wilful or that he had any evil motive or intent to defraud. We think that an error affecting such a vital aspect of the case is fundamental. Rule 52(b) F.R.CrimP. provides:

> 'Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'"

The results of the *Mann* case are consistent with those promulgated by this Supreme Court in *Leary* v. *United States, supra,* and are necessary for preservation of the Constitutional dictates of due process and the privilege against self-incrimination.

IV

The various Circuit Courts of Appeals have each, since 1897, established their own criteria for instructing a jury that it may presume or infer criminal intent.

The various Circuit Courts of Appeals have each, since 1897, also established their own criteria as to when such an instruction is to be used.

There is non-uniformity among the circuits such as to justify this Supreme Court exercising its jurisdiction to review the law. Such a review has become necessary as the only means to restore uniformity of law to a vital area

of basic substantive rights which have not been squarely before this Court since the year 1897.

Respectfully submitted,

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July, 1969

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
APR 7 1969
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY 1969 TERM

J. D. McCARTY,
Appellant,

vs. : No. 9986

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

John C. Moran (James W. Bill Berry with him on the brief) for Appellant.

Willard C. McBride (Mitchell Rogovin, Assistant Attorney General of the United States, and Joseph M. Howard and Richard B. Buhrman, Attorneys, Department of Justice) for Appellee.

Before MURRAH, Chief Judge, SETH, Circuit Judge, and CHRISTENSEN, District Judge.

[APPENDIX]

CHRISTENSEN, District Judge.

Appellant was indicted on three counts charging willful attempts to evade his income taxes for 1960, 1961, and 1962 by filing false and fraudulent returns in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, and on three counts charging the willful subscribing of returns for those years which he did not believe to be true, in violation of Section 7206(1) of the Code, 26 U.S.C. 7206(1). The jury acquitted on all counts relating to the years 1960 and 1961, but found him guilty on the 1962 charges. In this appeal from the trial court's judgment of conviction and sentence appellant claims that the evidence was insufficient to justify the verdict, that the trial court erred in receiving summary exhibits and that the instructions to the jury were deficient or erroneous.

A reading of the record is convincing that the evidence supports the verdict and that it was not error for the trial court to deny appellant's motion for judgment of acquittal.

While smaller, though substantial, disparities were indicated by the evidence for the prior years, the government's net worth proof for the year 1962 tended to show that the appellant had received $34,114.59 in taxable income and had reported $13,427.33, leaving an unreported deficiency of $20,687.26. The reconstructed 1962 income tax was $11,626.50, as compared with $3,317.39 submitted on his return. The specific item proof served to confirm substantially these figures. The government's proof of specific items indicated that there was $22,038.22 of unreported income for 1962. Indeed, the appellant's experts did not question that by both the net worth and specific item proof failure to report substantial income was shown.[1]

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[1] One of appellant's witnesses testified with reference to his checking of government's figures: ". . . . For the year 1962, we show corrected taxable income of $28,723.29. The taxable income per the return was $13,427.33. This is in comparison with an under-reporting of

Appellant does not question substantial deficiencies so much as proof of willfulness. He relies on the established rule that willfulness cannot be inferred from a mere understatement of income, and that proof of specific intent to evade known tax liability is essential to a felony conviction. Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). It is argued that appellant's books and records appeared correct on their face, that "his bank deposits in fact disclosed the proved deficiency," and that absence from his office and the inexperience of his clerical help are consistent with innocent mistake or omission.[2]

We think that there were proved circumstances beyond mere unreported tax liability from which the jury reasonably could have found that the understatement for 1962 was willful.

The government specifically proved that in 1962 the appellant received twelve monthly checks, each in the amount of $1,000, from the Oklahoma City Chamber of

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[1] (Continued)

insurance commissions and Chamber of Commerce Fees in the amount of $22,038.22. Now frankly, as to what precisely makes up that $7,000 difference, I cannot say. . . . If there had not been the deposits of income, if there had been no records, then it's true the Government would have had to gone [sic], possibly, to the net worth method. Here there were records. There is an understatement by the records of $22,000 in the year 1962, and there is an additional taxable income on which the income tax has not been paid."

[2] Quoting from Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954): "..... When there are no books and records, willfulness may be inferred by the jury from that fact coupled with proof of an understatement of income. But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation. On the other hand, the very failure of the books to disclose a proved deficiency might indicate deliberate falsification." *Id.* at 128.

Commerce as fees for services rendered, none of which was reported in his return either as to amount or source. These specific items alone were within $2,000 of the total taxable income he reported for the year. In addition, the government proved by direct eviednce that appellant had received in 1962 $10,038.22 of unreported income from insurance commissions and counseling.[3] The very fact that the deposit tickets, notwithstanding the absence of an indication of specific source, were readily available and were not misplaced or incorrectly noted by clerical personnel, could support rather than detract from proof of willfulness. The accountant who prepared his 1962 return did not examine any of the basic records but relied upon the information furnished him orally and in writing by appellant. Appellant indicated to the agents that he accumulated his income figures for tax purposes by examining his bank deposits with his secretary. The omission of every one of twelve monthly payments totaling $10,000 would render an inference of willfulness not unreasonable in view of all of the evidence. There was evidence tending to show that during the year appellant purchased and paid for about $22,000 worth of securities, deposited $1,500 in a savings account and made personal expenditures of about $10,000, which was another indication from which the jury could have inferred that he knew that he was making substantially more than the $13,427.33 reported on his 1962 return.

We cannot accept the argument that beyond the willfulness to be inferred from this record some express evidence of "fraud" or evil intent, such as the willful falsification of records apart from the return in question, was

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[3] We are not unmindful of appellant's claim that there was confusion incident to the reporting of insurance income on an accrual basis following the incorporation of his insurance business in the latter part of 1962; but if this affected his action it would be reasonable to infer that any variance of understanding could not have explained the major discrepancies.

indispensable to any conviction. Notwithstanding various means of proof, the gist of the charges was willfulness in making a false return, not fraud or deceit in an abstract sense or in different context. We conclude that the question of willfulness was for the jury.[4]

The appellant's contention that the government improperly used "false testimony" and summary exhibits incorporating that testimony to convict him arises in view of evidence tending to prove: In 1961, a bill was pending before the Oklahoma House of Representatives to legalize pari-mutuel betting on horse races. Appellant was then Speaker of the House of Representatives. There was a group interested in seeing that this bill was passed with a view to managing a race track in Oklahoma. Among them were Dillon, Wallace and Barron. They talked at Albuquerque, New Mexico, of obtaining a license and of "publicity and whatever it might take to get the race track going" in Oklahoma City. For the purpose of advancing the project Wallace obtained a cashier's check for $5,000 payable to Oklahoma City; but when Barron said this check wasn't any good to him because cash was necessary, the check was converted into currency and the currency, according to Wallace and Dillon, delivered as such to Barron pending the latter's trip to Oklahoma City. Barron testified that he did not receive currency as such but a "bulky envelope" from either Wallace or Dillon. He said he did not definitely know that this envelope contained currency and was precluded by defendant's objection from testifying what "it was alleged to contain." Barron traveled to Oklahoma City within a few days, had a conference concerning the race track project with others there and then visited appellant at the State Capitol where in the course of a conversation concerning the pending bill he handed the envelope to

[4] Swallow v. United States, 307 F.2d 81 (10th Cir. 1962); Windisch v. United States, 295 F.2d 531 (5th Cir. 1961); Palermo v. United States, 254 F.2d 130 (9th Cir. 1958).

appellant who put in a drawer of his desk. Following their initial introduction and before the delivery of the envelope appellant volunteered that he understood Barron was with a group that was interested in the racing picture and said that the chances of the bill's passing looked favorable. Barron further testified that when he handed appellant the envelope nothing was said about it by either one of them but that appellant put the envelope in a drawer of his desk. There was testimony from a fellow legislator that subsequently he was asked by appellant not to take the floor in opposition to the bill but to let the sponsor make a good show and that the bill was not going to pass anyway. The appellant testifying in his own behalf denied positively that he had received any envelope or money from Barron and testified that he had no recollection of ever having met him, although as to the latter he "could be in error."

Appellant did not object in the first instance to the admission of the circumstantial evidence now in question, but before the government had rested unsuccessfully moved generally to strike the testimony of three of the four witnesses called by the government on the subject, objected to the "conclusions" of the government expert in identifying the $5,000 item in the summary exhibits covering the year 1961 offered in evidence by the government, and objected to the admission of the summaries themselves by reason of the inclusion of that item. While only the rulings denying the last two objections have been argued on this appeal, all were presented to the trial court on the theory that the government's related proof was speculative and conjectural and did not sufficiently tend to establish the receipt by the appellant of the $5,000 included in the government's summary.

The trial court instructed the jury concerning the function of summary exhibits, including a reminder "that it is the books, the records, the testimony and the documents which are in evidence and the summaries are admitted only to assist you in considering that evidence for that

purpose, and you are entitled to consider them."[5] No exception was taken to this instruction and its sufficiency is not attacked here. The appellant having denied receiving any envelope or any money from Barron, the $5,000 item was omitted from the summary presented by his expert. We are really concerned not so much with the summaries as with the evidence on which they were based.

The problems presented to the trial court during the taking of evidence concerned admissibility. At the close of the evidence it was not called upon nicely to weigh the sufficiency of the circumstances to warrant an inference that $5,000 was received by appellant; appellant's motion for acquittal at the close of all of the evidence was made in general and no motion to strike was then interposed.

In the practicalities of a trial, the fragmenting of attacks upon circumstantial evidence usually is not feasible; and a trial court in determining sequential admissibility of the parts may not be held strictly accountable for final evaluation in advance of the developing whole.[6] We cannot say on this record that the rulings of the trial court

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[5] Apparently this and the language preceding it was patterned after an instruction considered proper in Swallow v. United States, 307 F.2d 81 (10th Cir. 1962). *See also* Conford v. United States, 336 F.2d 285 (10th Cir. 1964). The difference in the construction and punctuation of the phrase last quoted, possibly the reporter's inadvertence, is not considered critical. When the government moved to strike some of the appellant's summary exhibits because of errors discovered after their admission, his counsel approvingly referred to the court's proposed instructions: "Your Honor, you cover it in your instructions. You tell them that these summaries are not evidence in the case . . ." The government's motion on counsel's statement was denied.

[6] As Professor Wigmore has put it: "The second condition peculiar to litigious proof is that the question with which the law of Evidence in the strict sense has to do (that is the rules regulating the production of evidence by opposing parties) is one of Admissibility not of Demonstration or Proof . . . whether a particular fact is fit to be considered and not whether it suffices for a demonstration." I Wigmore on Evidence (Third Ed.) § 28.

were erroneous, nor do we think that any prejudice is indicated since appellant was acquitted on the charges for the year to which the questioned evidence directly pertained.

We are not unmindful of the contention that "false testimony knowingly secured and given projected iteself (from 1961) into the year 1962 when the jury took the false schedules in their deliberations." This, of course, overlooks the fact that there was no residual prejudice which prevented the appellant's acquittal on the 1960 charges as well. We recognize, however, the possibility that not being convinced beyond a reasonable doubt as to the 1960 and 1961 charges, the evidence as to those years could have had some influence in the consideration of the 1962 counts and, hence, we have considered it necessary to examine appellant's contention further.

It is true that the government's evidence with respect to 1961 was highly circumstantial and in one vital respect conflicting. Yet, the question of truth or falsity, as well as the reasonable inferences to be drawn, was for the jury. In determining whether the circumstantial evidence was sufficient, the evidence and the legitimate inference to be drawn therefrom are viewed in a light most favorable to the government.[7] There was no direct testimony that the bulky envelope which Barron testified he handed to appellant actually contained the $5,000 which according to two of the witnesses was delivered to Barron before he called upon appellant. But direct, as distinguished from circumstantial, evidence is not essential to a criminal conviction[8] and manifestly evidence does not have to be direct to war-

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[7] United States v. Ayotte, 385 F.2d 988 (10th Cir. 1967); Reed v. United States, 377 F.2d 891 (10th Cir. 1967).

[8] Reed v. United States, 377 F.2d 891 (10th Cir. 1967); Wall v. United States, 384 F.2d 758 (10th Cir. 1967); Swallow v. United States, 307 F.2d 81 (10th Cir. 1962); Estep v. United States, 140 F.2d 40 (10th Cir. 1943); Palermo v. United States, 254 F.2d 130 (9th Cir. 1958); *Cf.* American Tobacco Co. v. United States, 147 F.2d 93, affd. 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1945); Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).

rant its receipt or consideration at all. It was the province of the jury to resolve conflicts and to reconcile the testimony if reasonably possible, considering the motives of the witnesses with respect to concealments or admissions, and all other circumstances in the case. Appellant's denial that he received any envelope or other package from Barron while hedging as to whether an interview actually took place as claimed, the knowledge appellant displayed of the intended subject matter of the visit immediately following Barron's introduction and before anything was said by Barron, appellant's suggestion to Barron that the bill likely would pass, contrasted with his subsequent advice to a fellow legislator not to talk against the bill and that it would not pass anyway, and the appellant's acceptance from Barron of a bulky envelope without comment or explanation on the part of either, according to Barron, were additional circumstances to be considered.

Finding no error or fundamental unfairness on the part of the trial court in the receipt of the circumstantial evidence concerning 1961 or in permitting it to be considered by the jury on the whole record, and the verdicts indicating as they do a discriminating consideration of the clearly sufficient evidence concerning 1962, the indirect attack upon the convictions relating to the later year must be rejected.

What we have said concerning the sufficiency of the evidence supporting the 1962 counts is largely dispositive of the first of appellant's claims of error in the instructions to the jury. The trial court refused defendant's request No. 22 which would have had the court charge "that it is incumbent upon the Government not only to prove beyond a reasonable doubt that the defendant filed a false and fraudulent income tax return, but they must go further and prove beyond a reasonable doubt that the defendant committed some willful and fraudulent act or acts, the likely effect of which would be to mislead or conceal from the taxing officers the amount of income upon which the

tax is levied." This request focused upon the question of willfulness of acts other than that of filing a false return with intent to evade a recognized tax liability. The likelihood that other acts would mislead the taxing officers is again a little wide of the mark. General or collateral deceit, as distinguished from such specific intent is not an essential element of a volation of Section 7201. Sansone v. United States, 380 U.S. 343 (1965). To the extent that appellant's request constituted a proper statement of the law it was reflected adequately in the court's charge.[9] We think this comment from Agnew v. United States, 165 U.S. 36, 51 (1897), is apt here:

> "The Court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. . . . [Citations omitted.] The instruction given was quite correct and substantially covered the instruction refused and as to the latter the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead."

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[9] The court charged among other things: "The word 'attempt' as used in this law involves two things: First, an intent to evade or defeat the tax; and second, some act by the taxpayer in furtherance of such intent. The word 'attempt' contemplates that the defendant had knowledge and understanding that during the calendar year 1960, 1961 and 1962, that he had income in such years which was taxable and which he was required by law to report, and that he attempted to evade or defeat the tax thereon or a substantial part thereof, by purposely failing to report all of the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such years. The intent of the accused to evade the tax as charged in Counts 1, 2 and 3 must be proved beyond a reasonable doubt to your satisfaction. There are various devices that may be resorted to in an attempt to evade or defeat tax. The one alleged in this indictment is the filing of false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists of wilfully attempting to escape the tax. The attempt to evade and defeat the tax must be a wilful attempt. That is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax law which it was the duty of the defendant to report to the Government. The attempt must be intentionally done with the

Finally, the appellant singles out the following portion of the court's charge as improperly shifting the burden of proof from the government to the defendant:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> "So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused."

Such a charge standing alone has been criticized[10] not without some justification as confusing, clumsy, or unnecessary, if not prejudicial, in other cases held to consti-

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9 (Continued)
intent that the Government should be defeated of the income tax due from the defendant. 'Wilful' implies bad faith and evil motive . . .

"You are instructed that a tax return may be false because it is merely incorrect due to negligence or some other cause lacking in intent, or not involving a tax. Such a return is not necessarily wilful or an attempt to evade taxes. Thus in this case if you find that the defendant did fail to report income, but that such failure was due to negligence, inadvertence, or a misunderstanding of the law, or some other cause lacking in intent, then you must vote to acquit even though the failure to report does technically make the return a false return. The law does not impose upon the defendant a duty to produce evidence on any issue and a defendant has the right to rely upon the failure of the prosecution to establish beyond a reasonable doubt any essential element of the offense charged, if such failure in fact is found by the jury as to any particular count or counts."

10 United States v. Releford, 352 F.2d 36 (6th Cir. 1965), *cert. denied*, 382 U.S. 984, 86 S.Ct. 562, ... L.Ed.2d ..... (1966); United States v. Denton, 336 F.2d 785 (6th Cir. 1964); Imholte v. United States, 226 F.2d 585 (8th Cir. 1955); Moore v. United States, 375 F.2d 877 (8th Cir. 1967).

tute reversible error,[11] and in another case deemed plain error.[12] When taken in context with an entire charge, however, most courts,[13] including this one,[14] which have considered the question, have accepted its principle as involving a mere rule of circumstantial evidence not inconsistent with the burden of the government and the doctrine of reasonable doubt, or at worst, as not constituting prejudicial error considering the instructions as a whole. Appellant professes to see significant difference in earlier cases decided by this court and the instant circumstances, pointing out that in *Roper* it is made clear that any presumption of the nature mentioned is rebuttable and that evidence tending to negate intent to defraud had to be considered. Yet appellant especially criticizes the instruction here because it contained the expression, "so unless the contrary appears from the evidence." The latter expression in the context of the whole instructions was merely a different way of indicating that any inference was rebuttable, and no more shifted the burden of proof than did the *Roper* charge. Indeed, the instant charge was in some respects more circumspect. We think here, as was indicated in

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11 United States v. Barash, 365 F.2d 395 (2d Cir. 1966); Berkovitz v. United States, 213 F.2d 468 (5th Cir. 1954); Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953); Bloch v. United States, 221 F.2d 786 (9th Cir. 1955). *Cf.* Hibbard v. United States, 172 F. 66 (7th Cir. 1909).

12 Mann v. United States, 319 F.2d 404 (5th Cir. 1963). *But Cf.* Helms v. United States, 340 F.2d 15 (5th Cir. 1964).

13 Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897); Estes v. United States, 335 F.2d 609 (5th Cir. 1964); United States v. Denton, 336 F.2d 785 (6th Cir. 1964); Sherwin v. United States, 320 F.2d 137 (9th Cir. 1963), *cert. denied,* 375 U.S. 946, 84 S.Ct. 481, 11 L.Ed.2d 420, *reh. denied,* 376 U.S. 946, 84 S.Ct. 796, 11 L.Ed.2d 771 (1964); United States v. Wilkins, 385 F.2d 465 (4th Cir. 1967); United States v. Littlejohn, 96 F.2d 368 (7th Cir. 1938).

14 United States of America v. Tijerina et al., ... F.2d ..... (10th Cir. 1969); Elbel v. United States, 364 F.2d 127 (10th Cir. 1966); Roper v. United States, 54 F.2d 845 (10th Cir. 1931); cf. Laws v. United States, 66 F.2d 870 (10th Cir. 1933).

Roper, that it was clear to the jury that to convict it had to find from the evidence beyond a reasonable doubt that the defendant had the specific intent charged and that while circumstantial evidence, including inferences, could be considered, the burden of proof remained with the government. Omitted from the quotation utilized by appellant were related instructions immediately preceding or following it,[15] as well as other parts of the charge[16] rendering it plain that a specific intent to evade payment of the tax had to be proved and could not be presumed.

While no exceptions were taken to the court's charge, we have examined the instructions in view of the appellant's claim that they involved plain error in the above-mentioned respects. From what has been noted it is abundantly clear that they did not.[17] Any deficiencies in the instructions short of fundamental error were waived. Fed. R. Crim. P. 30.

AFFIRMED.

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[15] A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent. Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means.

While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there could be no eyewitness account of the state of mind with which the act or acts were done or omitted; but what the defendant does or fails to do may indicate intent or lack of intent to commit the offense charged...

Unless otherwise instructed, in determining the issues of intent, the jury is entitled to consider any statement made or acts done or omitted by the accused and all facts and circumstances in evidence in this case which may aid the determination of the state of mind of the accused.

[16] Some of these are quoted in footnote 3, and there were in addition the usual instructions concerning the presumption of innocence and the government's burden of proof to establish by evidence each essential element of the charge beyond a reasonable doubt.

[17] United States of America v. Tijerina et al., ... F.2d ..... (10th Cir. 1969); Moore v. United States, 375 F.2d 877 (8th Cir. 1967); *Cf.* Bloch v. United States, 221 F.2d 786 (9th Cir. 1955).

APPENDIX B

PORTIONS OF THE TRANSCRIPT OF PROCEEDINGS IN THE DISTRICT COURT

VOLUME I

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) No. 67-93 (Cir.)
)
J. D. McCARTY,)
Defendant.)

BEFORE:

HONORABLE LUTHER BOHANON
United States District Judge
Northern, Eastern & Western District of Oklahoma;
and A JURY

TRANSCRIPT OF TRIAL PROCEEDINGS
Oklahoma City, Oklahoma

July 17, 18, 19, 20, 21, and 22, 1967

(Proceedings on July 17, 18 & 19, 1967, herein; Proceedings on July 20, 21 & 22, 1967, in Volume II)

APPEARANCES:

For the Plaintiff:

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Washington, D. C.

For the Defendant:

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The following portions of the trial proceedings are cited as they appear in the Court Reporter's Transcript of Proceedings filed in the case.

Mr. Bill R. Maynard on cross-examination (R. 421):

Q. "And do you recall how many hours you spent in the office of J. D. McCarty in this particular case?

A. I spent something like 2000, over 2000 hours.

Q. You don't know how many in Mr. McCarty's office?

A. No, sir.

Q. Or does that include that?

A. That includes that."

Mr. Bill R. Maynard on cross-examination (R. 437):

Q. "You weren't refused any books and records, were you?

A. I was not refused any books or records.

Q. Did you ever ask for any books or records and be refused?

A. No, sir, I was not refused any books and records."

Mr. Bill R. Maynard on cross-examination (R. 452):

Q. "Now the items of income that you say are omitted for the period involved, did you find all of those items deposited to the bank account in the regular course of business?

A. Yes, sir."

CHARGE TO THE JURY

THE COURT: Now to the jury, you have heard the argument and the evidence in this case, and it becomes the Court's duty to give you the instructions as to the law to be applied by you in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the law and the rules so given to the facts as you find them from the evidence in this case.

(THE COURT: Mr. Marshal, will you watch the door and keep people from going in and out while the instructions are being given, please.)

THE COURT: (Continuing) You are not to single out one of the instructions alone as stating the law, but you are to consider the instructions as a whole. Neither are you to consider the wisdom of any rule of law stated to you by the Court. Regardless of any opinion which you might have as to the rules of law or as to what the law ought to be or should be, it would be a violation of your sworn duty to base your verdict upon any other view of the law except that as stated to you by the Court in these instructions.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not guilty plea of the accused.

You are to perform your duty without bias or prejudice to any party. The law does not permit jurors to be governed by sympathy, by prejudice or by public opinion. Both the accused and the public expect that you will carefully and impartially consider all of the evidence in the case and follow the law as stated to you by the Court, and render a just verdict regardless of the consequences.

Statements and arguments of counsel are not evidence in any sense of the word unless made as an admission or stipulation of fact.

When the attorneys on both sides have stipulated or agreed as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as conclusively proved.

Unless you are otherwise instructed, the evidence in this case always consists of the sworn testimony of witnesses regardless of who may have called them, all exhibits received in evidence regardless of who may have introduced them, and all facts which may have been admitted or stipulated to, and all proper deductions to be drawn from the evidence.

Anything you may have seen or heard outside the courtroom, touching the merits of the case, is not evidence and must be entirely disregarded by you.

You are instructed to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bold statements of the witnesses. In other words, you are not limited solely by what you see and hear as the witness testifies.

On the contrary, you are permitted to draw from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experiences.

The indictment is not evidence in any sense of the word, but is a mere accusation which it is incumbent upon the Government to sustain by a proper measure of proof.

Every defendant in a criminal case is presumed at the outset to be innocent, and this presumption exists in his favor and abides with him for his proper protection at every stage of the trial until his guilt is established by the evidence beyond a reasonable doubt.

[APPENDIX]

The burden of proving guilt rests upon the Government and must be sustained by evidence which establishes guilt beyond a reasonable doubt.

By reasonable doubt is not meant a possible doubt, but such a doubt arising from the evidence or the lack of evidence which leaves your mind in such a state that you cannot say that you have an abiding conviction to a moral certainty of the guilt of the accused. If this is the state of your mind, you should acquit.

If, however, after due deliberation and viewing all of the evidence, you can say that you have an abiding conviction to a moral certainty of the guilt of the defendant, then you should convict him.

Now the indictment was read to you in the beginning of this case and the Court will not at this time take time to read the indictment as it is, word for word; but it will be furnished to you in your jury room for study and reading, to your desire.

The first three counts, however, of the indictment, Counts 1, 2 and 3, are brought under a section of the Internal Revenue law of the United States which provides in substance as follows:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by the laws of the United States is guilty"

of the criminal offense with which this defendant is here charged in each of these three counts.

The last three counts of the indictment, Counts 4, 5 and 6, are brought under a section of the Internal Revenue laws of the United States which provide as follows:

> "Any person who wilfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that it is made

under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be punished as provided by law."

Count 1 of the indictment charges that the defendant wilfully and knowingly attempted to evade and defeat a substantial amount of income tax which was due and owing by him and his wife to the United States for the calendar year 1960, by filing or causing to be filed with the District Director of Internal Revenue, Oklahoma City, Oklahoma, a false and fraudulent income tax return when he then and there well knew that his and his wife's taxable income and tax shown thereon were substantially greater than that reported on their 1960 income tax return.

Count 2 of the same indictment charges the defendant with wilfully and knowingly attempting to evade and defeat a substantial amount of income which was due and owing by him and his wife to the United States for the calendar year 1961, by filing or causing to be filed with the District Director of Internal Revenue, Oklahoma City, Oklahoma, a false and fraudulent income tax return, when he then and there well knew that his and his wife's taxable income, and tax shown thereon, were substantially greater than that reported in their 1961 income tax return.

Count 3 of the indictment makes the same charge as Count 2, except that it is in reference to the year 1962 and the figures of income and tax are different.

I will not detail the exact amount of the alleged taxable income and tax specified by each of the counts; and as stated to you before, the indictment will be before you in your jury room.

Count 4 of the indictment charges that the defendant did wilfully make and subscribe and cause to be made and subscribed, a document, to-wit, a United States individual income tax return in the name of J. D. McCarty and Bessie Mae McCarty for the year 1960 which was verified by a

written declaration that it was made under the penalty of perjury, and which was filed with the District Director of Internal Revenue, Oklahoma City, Oklahoma, which the defendant did not believe to be true and correct as to every material matter, in that he received income from certain specific sources, whereas he then and there well knew he had substantial additional income.

Count 5 of the indictment makes the same charge as Count 4, except that this charge relates to the income tax return of the defendant and his wife for the year 1961.

Count 6 of the indictment makes the same charge except that this count relates to the income tax return of the defendant and his wife for the year 1962.

To establish its case on Counts 1, 2 and 3 of the indictment, the Government must prove beyond a reasonable doubt both the following two elements:

One, that substantial income tax was due and owing from the defendant in addition to that declared in his income tax return; and

Two, that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment is the wilful attempt on the part of the taxpayer to defeat, to evade or defeat tax imposed by the income tax law.

The word "attempt" as used in this law involves two things: First, an intent to evade or defeat the tax; and second, some act by the taxpayer in furtherance of such intent.

The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar year 1960, 1961 and 1962, that he had income in such years which was taxable and which he was required by law to report, and that he attempted to evade or defeat the tax thereon or a substantial part thereof, by purposely failing

to report all of the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such years.

The intent of the accused to evade the tax as charged in Counts 1, 2 and 3 must be proved beyond a reasonable doubt to your satisfaction.

There are various devices that may be resorted to in an attempt to evade or defeat tax. The one alleged in this indictment is the filing of false and fraudulent returns with the intent to defeat the tax or liability.

The gist of the crime consists of wilfully attempting to escape the tax. The attempt to evade and defeat the tax must be a wilful attempt. That is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax law which it was the duty of the defendant to report to the Government.

The attempt must be intentionally done with the intent that the Government should be defeated of the income tax due from the defendant.

"Wilful" implies bad faith and evil motive. The word "knowingly" as used in Counts 1, 2 and 3 of the indictment, means the doing of an act or acts voluntarily and intentionally.

If you find that the defendant signed his individual income tax returns, you may consider that as a circumstance in determining whether he had knowledge of the contents of those returns.

The defendant has denied that he wilfully and knowingly attempted to evade any income tax by filing any false and fraudulent tax return, or otherwise, and he denies that he filed any false or fraudulent tax return for any of the years involved herein.

To establish taxable income, the Government must rely upon proof of the so-called net worth plus non-deductible expenditures method.

I should explain that a man's net worth is the difference between his assets and his liabilities at any given date. It is the difference between what he owns or possesses and what he owes or is obligated to pay at that time.

If at the end of the year a difference between the defendant's assets and liabilities is greater than the difference between the assets and liabilities at the beginning of the years, his net worth has obviously increased.

However, only the cost price of the asset is to be considered. Mere increase in market value which has not been realized must not be taken into account.

The theory of the net worth method of proof is that if the Government proves beyond a reasonable doubt that the defendant's net worth, as I have just defined it to you, has increased during the taxable year, it may be inferred that the defendant has had receipts of either money or property during the year; and if the Government satisfies you beyond a reasonable doubt that either the defendant had a source of taxable income or that the receipts did not come from non-taxable sources, you may find that the receipts constituted income to the defendant.

If in addition to proving an increase in defendant's net worth the Government also proves that the defendant spent money on items which did not add to his net worth at the end of the year, such as non-taxable business or personal items including living expenses, federal income tax, life insurance, clothing, and so forth, it may be inferred that these expenditures also came from funds constituting income received during the year.

Consequently, such expenditures may also be taken into account and added to the net worth increase in determining the amount of the defendant's income for that year or years.

In deciding the question of whether any net worth increase or personal expenditures reflect the receipt of tax-

able as opposed to non-taxable funds, you may consider the evidence, if any, of the existence of a likely source of taxable income, such as trade or business or profession or other evidence of a taxable source of income.

If you find such a source, you may properly deduct that the net worth increase sprang from that source and is taxable.

If there is no satisfactory evidence to identify a likely source of taxable income, you may nonetheless consider such evidence as there may be tending to show that the increase in net worth and the expenditures shall not have come from any substantial non-taxable source, such as gifts or inheritances or undeposited currency at the beginning of the year 1960, the first year for which the defendant is indicted.

And if you find that the alleged increase in net worth and personal expenditures made did not come from any substantial non-taxable source, you may properly conclude that they came from an undisclosed source of income.

In this case the Government has undertaken to prove what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year or years.

The Government has endeavored to prove that the defendant did not have any assets at the beginning of the year other than those disclosed as a result of its investigation, which has been admitted in evidence.

The Government has introduced evidence which, if you would believe it, would tend to establish money paid out by the defendant for non-deductible and personal expenditures, such as federal income tax, living expenses, and other personal expenditures.

The Government claims that the sum of the defendant's net worth increase and his personal expenditures for each year constitutes the defendant's income before ex-

emptions, which he is entitled to subtract from that figure the amounts allowed under the law for personal exemptions. The resulting figure represents taxable income.

This figure is alleged by the Government to be a reasonable approximation of what the defendant should have reported on his income tax return as taxable coming within the particular year involved.

The burden rests originally upon the Government and the burden remains upon the Government to establish a fixed starting point; but what is meant is that the Government must prove beyond a reasonable doubt that the income reported by the defendant for a particular year is not sufficient to account for the increase in his net worth, plus personal expenditures, he made for the particular year.

If you find that the Government has not established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in Counts 1, 2 and 3 of the indictment, you will return a verdict of not guilty as to such count or counts of the indictment.

If you find on the other hand that the Government has established the net worth of the defendant to a reasonable certainty as to the beginning of any year named in Counts 1, 2 and 3 of the indictment, and if you are so convinced beyond a reasonable doubt that the funds reflect an increase in net worth and expenditures during such year substantially in excess of income reported by the defendant's tax return, you will proceed to inquire whether the Government has established that those funds represent taxable income on which the defendant wilfully attempted to evade or defeat the tax.

You are instructed that gross income, in any individual, is generally all of the gains or profit, and income of whatsoever kind, and in whatever form paid, derived from any source whatsoever, whether from salaries, compensation for personal services, from professions, vocations,

trade, business, dealing in property real and personal, also from interest, rents, dividends, or from any transaction resulting in financial or monetary gain.

Gross income includes gains, profit or income from any source, legal or illegal, under a claim of right without restrictions as to its disposition, even though it might be claimed that the defendant is not entitled to retain the money.

If you find that a fraudulent return was filed with intent to defeat a part or all of the tax, and this was done wilfully, the crime is complete as soon as the filing takes place.

You are instructed that a tax return may be false because it is merely incorrect due to negligence or some other cause lacking in intent, or not involving a tax. Such a return is not necessarily wilful or an attempt to evade taxes.

Thus in this case if you find that the defendant did fail to report income, but that such failure was due to negligence, inadvertence, or a misunderstanding of the law, or some other cause lacking in intent, then you must vote to acquit even though the failure to report does technically make the return a false return.

The law does not impose upon the defendant a duty to produce evidence on any issue and a defendant has the right to rely upon the failure of the prosecution to establish beyond a reasonable doubt any essential element of the offense charged, if such failure in fact is found by the jury as to any particular count or counts.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence such as the testimony of an eyewitness.

The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of an offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

You may find evidence of intent to commit the crime of attempting to evade and defeat a tax, even though there is coupled with that intent a desire to suppress information for other purposes.

Thus if you should find that the defendant desired to conceal his receipts or money from any source, you may find in addition to such motive the existence of an intent to defeat the United States of money due as income tax and to attempt to defeat or evade such tax.

You are hereby instructed that the use of currency by the defendant is not prohibited, nor is it a violation of any law of the United States. Standing by itself, the use of currency does not constitute a violation of the statute upon which this action is based.

The fact, however, if you should find it to be a fact, that the defendant made it a habit of dealing in currency may be considered by you in determining the intent of the defendant.

It is not necessary that the Government establish that the amount of income received and the amount of tax owing were exactly the amounts alleged in the various counts of the indictment charging an income tax evasion.

The precise amount of the tax is not the gist of the offense. It will be sufficient if the Government proves beyond a reasonable doubt that there was a wilful and knowing attempt to evade a substantial part of the income tax as alleged in the separate counts of the indictment.

If you find from the evidence that there was taxable income received and not reported, as the law requires, it makes no difference in so far as the question of liability

for tax is concerned whether such income was lawfully received or unlawfully received, since the law makes no distinction between taxable income which is lawful and that which is unlawful in determining liability for income tax purposes.

In this case, you have heard the testimony of experts, or summary witnesses, based upon their analysis of various books, records, documents and testimony which have been introduced in evidence.

This class of testimony is proper and competent evidence concerning matters involving knowledge, skill or experience in a subject which is not within the realm of ordinary knowledge of mankind, and which requires special training or study to understand.

The law allows those skilled in special fields to express opinions and to say whether or not according to their knowledge and experience a fact may or may not exist.

Nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them.

Jurors are not bound by the testimony of experts and the testimony of such experts is to be canvassed and weighed as that of any other witness. Just so far as their testimony appears to your judgment to be convincing you of its truth you should adopt it; but the mere fact that a witness is called as an expert and gives opinion upon a particular point, does not necessarily obligate the jury to accept his opinion as to what the facts are.

There have been admitted in evidence certain exhibits variously referred to as schedules or summaries, but they were admitted as summaries of other evidence in the case and they were admitted only for your assistance and convenience in considering the other evidence which they purport to summarize.

Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence in order to assist you in determining the ultimate facts or results shown by such books, records, testimony or documents; but you are reminded that it is the books, the records, the testimony and the documents which are in evidence and the summaries are admitted only to assist you in considering that evidence for that purpose, and you are entitled to consider them.

In connection with Counts 4, 5 and 6 of the indictment, where the defendant is charged with subscribing, under the penalty of perjury, his and his wife's 1960, 1961 and 1962 income tax returns, it is your duty as members of the jury to concern yourselves solely with the following questions of fact:

(A) Whether the returns in question were made and subscribed or signed by the defendant;

(B) Whether the defendant if he made and subscribed to these returns acted wilfully at the time of making and subscribing them;

(C) And whether the defendant, if he made and subscribed these returns, believed the alleged false statements to be true and correct as to every material matter.

If you find that the 1960, 1961 and 1962 federal income tax returns, Form 1040, and their attached addenda or schedules were made and subscribed or signed by the defendant in this case, then I instruct you that they were returns and documents as contemplated by Section 7206, Subsection 1, Title 26, United States Code.

For a violation of Section 7206, Subsection 1, Title 26 of the United States Code to occur, there must be (A) wilful making and subscribing of a return, statement or other document; (B) the return, statement or other document must contain a written declaration that it is made under penalty of perjury; (C) the maker or the person signing

the return must not believe the return, statement, or other document to be true and correct as to every material matter.

These are the three essential elements of Counts 4, 5 and 6.

The word "subscribe" simply means the signing of one's name to a document.

During the trial you have seen federal income tax returns, Form 1040, for the years 1960, 1961 and 1962. They are in evidence, each bearing the signature of J. D. McCarty.

The fact that an individual's name is signed to a return shall alone be sufficient evidence until evidence to the contrary is introduced that the returns were actually signed by him.

In other words, in the absence of evidence to the contrary, the fact that the signature of J. D. McCarty appears on the tax returns in issue in this case creates a presumption that J. D. McCarty, the defendant in this case, actually did sign the return and that you may so find without further proof.

The statute which I have been mentioning, Section 7206, Subsection 1, Title 26, U. S. Code, you will remember the word "wilfully" as used and as I have said in this case, the matter of intent is an essential element and must be proved beyond a reasonable doubt before the accused may be found guilty of Counts 4, 5 and 6.

Therefore, in order to find the defendant guilty, you must not only believe that he did the acts complained of and of which he stands charged, but you must also beleive that the acts were intentionally and wilfully done, or rather that the acts were intentionally and knowingly done by him.

The word "knowingly" as set out and set forth in this indictment means the state of mind wherein the defendant

was in possession of facts from which he knew or was aware that he could not lawfully act or commit the acts of which he now stands charged.

The word "wilfully" means intentionally.

In order to find the defendant guilty of any of the counts 4, 5 and 6 of the indictment, you must be satisfied beyond a reasonable doubt that the failure of the defendant to report additional income received by him, if you so further find, was a material omission.

In this connection, I instruct you that an omission of a substantial part of the taxpayer's income from his tax return constituted a material omission, and if you are satisfied beyond a reasonable doubt that there was such an omission, and that it was wilful and that the defendant had knowledge thereof, you shall find the defendant guilty of such count on which you so find.

As to Counts 4, 5 and 6, which charges the defendant with subscribing to the income tax returns under penalty of perjury, which he did not believe to be true and correct as to every material matter, you are instructed that it is not necessary for the Government to prove that there was a tax due and owing for any of those years.

In order to prove the three counts of this indictment, to find the defendant guilty on Counts 4, 5 and 6, you must find that he knowingly and wilfully subscribed and signed his name to his income tax return or returns, under the penalty of perjury, knowing that he had not reported a substantial amount of his gross receipts in his income tax return or returns.

Whether or not the Government has sustained a pecuniary or monetary loss as a result of the alleged false returns is not an element of the offense or the offenses charged in Counts 4, 5 and 6.

You are again reminded, however, that Counts 1, 2 and 3 charge the defendant with the wilful intent to evade

or defeat his and his wife's income tax. In order to find him guilty, among other things you must find that there was an additional tax due and owing, as to Counts 1, 2 and 3.

You are instructed that an attempt to evade income tax for each of the years, as charged in Counts 1, 2 and 3 of the indictment, is a separate offense for each year.

It is also a different offense from that charged in Counts 4, 5 and 6, which I shall mention shortly.

The first three counts of the indictment charge separate offenses for the years 1960, 1961 and 1962, and must be considered and determined separately by you, although the essential elements of the offenses charged are the same in each of these three counts, that is Counts 1, 2 and 3.

You are also instructed that the offense charged in Counts 4, 5 and 6 of the indictment, of knowingly and wilfully subscribing to a return under the penalty of perjury, which the defendant allegedy did not believe to be true and correct as to every material matter, is a separate offense from that of an attempt to evade and defeat income tax.

Counts 4, 5 and 6 of the indictment also charge separate offenses for each year, that is, the years 1960, 1961 and '62, and must be considered and determined separately by you, although the essential elements of the offense charged are the same as to each or the counts; that is, 4, 5 and 6.

With respect to a major crime, such as charged in this case, specific intent must be proved before there can be a conviction.

A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent.

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means.

While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there could be no eyewitness account of the state of mind with which the act or acts were done or omitted; but what the defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.

So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused.

Unless otherwise instructed, in determining the issues of intent, the jury is entitled to consider any statement made or acts done or omitted by the accused and all facts and circumstances in evidence in this case which may aid the determination of the state of mind of the accused.

You are advised that a separate crime or offense is charged in each of the counts contained in the indictment herein. Each crime or offense as charged, and the evidence applicable thereto, should be considered separately and the fact that you may find the defendant guilty or not guilty of one crime or offense, should not control your verdict with reference to the other crimes or offenses charged in the indictment.

If you find from the evidence in this case and under the instructions beyond a reasonable doubt that the defendant on trial is guilty of the counts or crimes charged against him in this indictment, or any of them, then you

should find the defendant guilty as to any such count or crimes of which you so find him guilty; but if you do not so find or if you entertain a reasonable doubt as to the guilt of the defendant as to any of the counts or crimes charged against him, then you should find the defendant not guilty as to such counts or crimes of which you so find him not guilty.

Certain evidence has been introduced in this case tending to show that the defendant at the time of and prior to the date of the alleged commission of the offenses charged in the indictment bore a good reputation, and had a good character of a law abiding citizen in the community in which he resided.

Such evidence is proper for your consideration and if this evidence alone or if taken in consideration with the other evidence in the case, raises a reasonable doubt of the guilt of the defendant as to the crimes charged against him, it is your duty to give him the benefit of that doubt.

However, if the jury should be satisfied from all of the evidence in the case and under the law, including that of good reputation and good character, that the defendant was guilty beyond a reasonable doubt of the crime charged against him in this case, good reputation and character of the defendant constitute no defense to or justification for the crimes charged.

If you find and believe that any witness has knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all of or any part of the testimony of such witness's testimony, or give it such credibility as you may believe it deserves.

It is the duty of lawyers on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

Any question as to which the Court has sustained an objection, the jury is to disregard the question and may

not speculate as to what the witness would have said if permitted to answer the question.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not unless expressly stated, indicate any opinion as to the weight or the effect of such evidence.

As stated before, you the jurors are the sole judges of the credibility of all of the witnesses and the weight and effect of all of the evidence.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or the innocence of the accused.

There is nothing peculiarly different in the way jurors are to consider the proof in a criminal case from that in which all reasonable persons treat any question dependent upon evidence presented to them. You are expected to use your good sense, consider the evidence for only those purposes for which it has been admitted, and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty, say so by your verdict; if proved not guilty, then say so by your verdict.

Keep constantly in mind that it would be a violation of your sworn duty to base your verdict upon anything except the evidence in this case.

You are the sole judges of the facts, the weight of the evidence, the credibility of the witnesses. In determining the weight or the credibility of the witnesses, you may consider the interest if any which the witness may have in the results of the trial of this case, the relation of the witnesses to the parties, the bias and prejudice if any has been apparent, the candor, the fairness, the intelligence,

the demeanor of the witnesses, the ability of the witness to remember and to relate past occurrences, the means of observation and the opportunity of knowing the matters about which the witnesses testified.

From all of the facts and circumstances appearing in evidence and coming to your observation during the trial, aided by the knowledge which each of you possess in common with other persons, you will reach your conclusion.

The verdict must represent the considered judgment of each juror. In order to return a verdict in this case, it is necessary that all jurors agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement if you can do so without harm to your individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if you are convinced that you have been in error.

Upon retiring to your jury room, you will select one of your members to serve as foreman, who will preside over your deliberations and will be your spokesman in court.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff or marshal in whose charge you will be, and the Court will give it prompt attention. Never attempt to communicate with the Court except in writing, and bear in mind that you are never to reveal to the Court or to anyone how the jury stands, numerically or otherwise, on the question of guilt or innocence of the accused, until you have reached a unanimous verdict.

Proper forms of verdict have been prepared for your convenience by the Clerk.

APPENDIX C

The following motion for acquittal and motion for new trial was briefed and argued to the trial court.

Motion for Judgment of Acquittal, or in The Alternative, Motion for New Trial

Comes Now the defendant, J. D. McCarty, by and through his attorneys, John C. Moran and James W. Bill Berry, and under the authority of Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 29 (b), moves the Court that a judgment of acquittal be entered, or in the alternative, an order granting a new trial herein for the following reasons, to wit:

A. Defendant renews his motion made at the conclusion of the testimony herein for a judgment of acquittal and moves the Court that a judgment of acquittal of defendant be entered herein.

B. In the alternative, and if defendant's motion for a judgment of acquittal be denied, defendant moves the Court to grant him a new trial herein for the following reasons, to wit:

1. The Court erred in overruling defendant's motion for judgment of acquittal at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. Error of the Court in admitting incompetent, irrelevant and immaterial testimony over the objection of the defendant.

5. Error of the Court in overruling defendant's motion for a Bill of Particulars.

6. Error of the Court in overruling defendant's motion to quash grand jury subpoena used by the government as a tool for the prosecution.

7. Error of the Court in overruling defendant's motion to dismiss, for the reasons that the indictment returned by the grand jury was based entirely on prejudicial, heresay evidence.

8. Error of the Court in overruling defendant's motion for a mistrial due to misconduct of the government prosecution in making highly prejudicial *inflamatory* remarks in regard to defendant's evidence, wherein irreparable and *damagin* injury had been done to the defendant in the presence of, and hearing of, the jury.

9. Error of the Court in giving certain instructions to the jury, to wit: Instruction No. 27-a,* set out in detail in the attached brief.

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* Instruction No. 27-a given by the court, reads as follows:

"PROOF OF INTENT

"Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent, to commit the offense charged.

As a general rule, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the evidence in the case leads the jury to a different or contrary conclusion, the jury may draw the inference and find that the accused intended all the natural and probable consequences which one, standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Unless otherwise instructed, in determining the issues as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence in the case which may aid determination of state of mind."

10. Error by the Court in refusing to give requested instructions by the defendant, which the Court refused to give all as contained in said Court record.

11. Error by the Court in allowing the introduction of insufficient evidence by the government in that there was a total failure of proof in showing the elements of fraud, more particularly set forth as follows:

A) No introduction of evidence of any nature whatsoever, to show the mandatory requirement in fraud cases, that of knowledge of wilfullness or a state of mind, a specific intent or an active desire to evade taxes, *ei.*, none of the government's evidence even began to meet the measurements of even "a strong hint" or a "slight indication" that,

1) The acts complained of were wilfully done by the taxpayer, and in bad faith and with intent to evade and defeat the tax, for the reasons that:

a) The government's evidence was completely silent insofar as a showing of any form of deceitful practices such as, dual sets of books, false entries, or *alternations,* destruction of books and records, concealment of assets or income and the like which bespeak the necessary evil intent.

b) The government's evidence totally fails to show any type of positive action by the taxpayer such as controlling the books, or in directing his office help to hide or alter receipts.

c) Failure of the government's evidence, insofar as showing any type of a common scheme and plan to commit fraud.

12. Error by the Court in allowing the government to introduce illegal evidence wherein they knew or should have known would have adverse prejudicial affect on the jury.

13. Error by the Court in overruling all of the previous motions filed by the defendant herein.

The defendant requests that the Court consider the motions of the defendant and set a date for hearing of said motions so that the defendant may argue in support of this motion.

John C. Moran
James W. Bill Berry
Attorneys for Defendant

Filed August 28, 1967

SUPREME COURT, U. S.
No. 825
FILED
AUG 6 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

J. D. McCARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 323

J. D. MCCARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. i-xiii) is reported at 409 F. 2d 793.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1969 (Pet. i), and a petition for rehearing was denied on June 5, 1969. The petition for a writ of certiorari was filed July 10, 1969, and is thus out of time under Rule 22 of the Rules of this Court.

QUESTION PRESENTED

Whether the trial court committed plain error in instructing the jury on the element of wilfulness.

STATUTES INVOLVED

The Internal Revenue Code of 1954 provides:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[26 U.S.C. 7201.]

SEC. 7206. FRAUD AND FALSE STATEMENTS.

> Any person who—
>
> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * *
>
> * * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

[26 U.S.C. 7206.]

STATEMENT

After a jury trial, petitioner was convicted on one count charging that he had wilfully attempted to evade his income tax for the year 1962 by filing a false and fraudulent tax return, in violation of Section 7201 of the Internal Revenue Code of 1954; and on one count of wilfully making and subscribing (under the penalties of perjury) an income tax return for 1962 which he did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the Code (R. 854-856). Petitioner was sentenced to three years' imprisonment on the evasion count. Imposition of sentence on the false statements count was suspended and petitioner was placed on probation for three years, to commence upon the expiration of the sentence imposed on the evasion count.

The government proved by both the specific items method (direct evidence) and the net worth method, that a large part of petitioner's 1962 income was not reported on his income tax return. That return showed taxable income of $13,427.33 (R. 23). The government proved that in 1962 petitioner received twelve monthly checks, each in the amount of $1,000, from the Oklahoma City Chamber of Commerce as fees for services rendered, none of which were reported on his return (R. 181-182, 186). Petitioner admitted that he had received these checks (R. 770-771). In addition the government proved by direct evidence that in 1962 petitioner had received $10,038.22 of unreported income from "insurance com-

missions and counselling." The total of petitioner's 1962 unreported income as shown by the specific items method was therefore $22,038.22 (R. 475-477). As corroboration, the government introduced a complete net worth-expenditures analysis, showing that petitioner's net worth increased by $26,764.50 in 1962 (R. 505). After adding to this increase petitioner's non-deductible expenditures and giving him credit for $1,288 of non-taxable funds he received in 1962 (R. 518), his taxable income as reconstructed for 1962 was $34,114.59 (R. 519). The net worth figures therefore showed unreported taxable income of $20,687.26 (R. 519), and a corrected income tax of $11,626.50, as compared to the $3,317.39 reported on the return. Thus, 71.5 percent of the true tax liability was not disclosed on the tax return (R. 525). The correctness of these figures was generally corroborated by two expert witnesses who appeared for the defense (R. 640-642, 677-682, 801-803, 809).

Petitioner's 1962 return was prepared by one Stevens from information petitioner furnished him (R. 26, 32-33). Stevens did not examine any of petitioner's records but relied entirely upon the information petitioner furnished him orally and in writing (R. 35, 37). During the investigation, petitioner told a Treasury agent that in preparing his tax figures for the accountant "he [petitioner] with his secretary would go through the checks, canceled checks, and determine the expenses listed on the return, the itemized deductions, would go through the deposits to determine income, and go through his accounts current billing from the insurance company to determine his

commissions, indirect commissions" (R. 356-357). Petitioner admitted at the trial that he understood his own accounting records (R. 760).

Instructing the jury on the element of wilfulness, the trial Judge charged them as follows:

> The gist of the crime consists of wilfully attempting to escape the tax. The attempt to evade and defeat the tax must be a wilful attempt. That is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax law which it was the duty of the defendant to report to the Government.
>
> The attempt must be intentionally done with the intent that the Government should be defeated of the income tax due from the defendant.
>
> "Wilful" implies bad faith and evil motive. The word "knowingly" as used in [the count relating to evasion] means the doing of an act or acts voluntarily and intentionally. [R. 857-858.]
>
> * * * *
>
> You are instructed that a tax return may be false because it is merely incorrect due to negligence or some other cause lacking in intent, or not involving a tax. Such a return is not necessarily wilful or an attempt to evade taxes.
>
> Thus in this case if you find that the defendant did fail to report income, but that such failure was due to negligence, inadvertance, or a misunderstanding of the law, or some other cause lacking in intent, then you must vote to acquit even though the failure to report does technically make the return a false return. [R. 863.]
>
> * * * *

With respect to a major crime, such as charged in this case, specific intent must be proved before there can be a conviction.

A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent.

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means.

While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there could be no eyewitness account of the state of mind with which the act or acts were done or omitted; but what the defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.

So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused. [R. 871-872.]

ARGUMENT

As we have noted, this petition for a writ of certiorari was filed five days out of time. In any event,

there is no reason for review by this Court of the sole question presented, whether the trial court committed plain error[1] in giving the jury the instructions embodied in the last two paragraphs of its charge on wilfulness quoted in the Statement, *supra*, p. 6.

These paragraphs are free of the errors that characterized the instructions in *Wardlaw* v. *United States*, 203 F.2d 884 (C.A. 5), *Berkovitz* v. *United States*, 213 F.2d 468, and *Bloch* v. *United States*, 221 F.2d 786 (C.A. 9). The instructions in those cases referred to a "presumption" that a person intends the natural consequences of his acts, and stated that this presumption would arise simply from a conscious omission of income.[2] Here, on the other hand, the

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[1] Fed. R. Crim. P. 30 requires that in order to assign any portion of a charge as error, a party must object to it before the jury retires to consider its verdict. The obvious and salutary purpose of the requirement is to permit the judge to correct any error before submission, and thus avoid the necessity of retrial. That purpose is not served by a post-verdict motion for acquittal or new trial, such as petitioner filed in this case. Accordingly, the court below correctly treated the issue as being whether or not plain error had occurred (Pet. App. xiii). Nor is *Leary* v. *United States*, 395 U.S. 6, to the contrary. The objection there *was* raised prior to submission of the case to the jury, by motion for directed verdict; in that case the statutory presumption of 26 U.S.C. 176a was involved and it was clear from the start both that the attack went to the statute and that the statute would be relied upon. No such special circumstances exist here.

[2] The instruction in *Wardlaw* and *Berkovitz* stated:

> The presumption is that a person intends the natural consequences of his conscious acts, and a natural pre-

jury was told only what it was reasonable to infer. There was no suggestion of a legal requirement of inference, of necessary probative weight to be given any inference, or of other offense to the presumption of innocence. Nor does the instruction given here state that a specific intent to evade taxes can be inferred from the mere omission of items of gross income.

The first part of the instruction simply repeats what has been, for many years, the standard instruction on circumstantial evidence of intent—that a man generally intends the normal consequences of his acts.[3] The instruction is as necessary and proper in a prosecution for tax evasion as in any other case. The normal consequence intended in omitting large amounts of income from a tax return is that the income will not be taxed. To this intent that certain

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sumption would be if a person consciously, knowingly, or intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

The instruction in *Bloch* stated:

> The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes; that he intended to defeat the tax.

[3] See, *e.g.*, *Allen* v. *United States*, 164 U.S. 492, 496; *Agnew* v. *United States*, 165 U.S. 36, 53; *Debs* v. *United States*, 249 U.S. 211, 216; *Cramer* v. *United States*, 325 U.S. 1, 31; *Crews* v. *United States*, 160 F. 2d 746, 750 (C.A. 5); *Myres* v. *United States*, 174 F. 2d 329, 334 (C.A. 8); *Koehler* v. *United States*, 189 F. 2d 711, 713 (C.A. 5), certiorari denied, 342 U.S. 852.

items should not be taxed must be added a knowledge that they were taxable in order to find the element of wilful intent to evade taxes which is necessary for a violation of the statute. Whether it is reasonable to infer that the defendant knew that the omitted items of income were taxable depends upon all the evidence, including the defendant's education and experience, his treatment of other identical items, the size and character of the income, and any conduct suggesting or belying guilty knowledge. The instruction also covered this point fully and fairly. Unless the contrary appears from the evidence, the court charged, "the jury *may* draw the inference and find that the accused intended all of the natural and probable consequences which one *standing in like circumstances and possessing like knowledge* should reasonably have expected to result * * *." (Emphasis supplied.) The instruction was well attuned to the evidence. The evidence tended to prove that a large part of petitioner's 1962 income was not reported, that defendant gave his accountant incomplete information, and that petitioner's method of keeping his books would have shown him his true income as he was giving the accountant these figures. Manifestly, it was these "acts" and "circumstances" and "knowledge" in the light of which the instruction permitted the inference of a guilty intent to be drawn.

Most of the cases cited in the petition and in the opinion below for the proposition that there is confusion or conflict among the circuits share the flaws of *Wardlaw*, *Berkovitz* and *Bloch*. The exceptions are *United States* v. *Barash*, 365 F.2d 395 (C.A. 2),

where there was a timely objection to the charge, and *Mann* v. *United States*, 319 F.2d 404 (C.A. 5), certiorari denied, 375 U.S. 986. While the Fifth Circuit did hold in *Mann* that the charge given here was plain error, no circuit, including the Fifth (cf. *Helms* v. *United States*, 340 F.2d 15 (C.A. 5)), has ever followed that decision. Like the court below, they have tended to follow the contemporaneous contrary holding of *Sherwin* v. *United States*, 320 F.2d 137 (C.A. 9), certiorari denied, 375 U.S. 964, where the charge was upheld despite objection. *Sherwin* and *Mann* were before this Court simultaneously during the 1963 Term. While the government filed a protective petition in *Mann*, it basically opposed certiorari, on the ground that the correctness of the charges depended so heavily upon the evidence introduced at the trials that there was neither necessary inconsistency in the rulings nor prospect that review in this Court would give further guidance to lower courts. Both petitions were denied.[4]

Even assuming, for the sake of argument, that the instruction, standing alone, may have confused the jury, the rule (whether it be the "presumption" instruction, or the "inference" instruction involved in this case) is that the challenged instruction must be read in context with the total charge in order to see whether the jury was properly instructed on the issue of wilfulness. *United States* v. *Wilkins*, 385 F.2d 465, 473-474 (C.A. 4), certiorari denied, 340 U.S.

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[4] Certiorari was denied in *Sherwin*, No. 519, 1963 Term, on January 6, 1964, and in *Mann*, No. 662, 1963 Term, on January 13, 1964.

951; *United States* v. *Releford*, 352 F.2d 36 (C.A. 6); *Walsh* v. *United States*, 174 Fed. 615, 618-619 (C.A. 7); *United States* v. *Littlejohn*, 96 F.2d 368, 381-382 (C.A. 7), certiorari denied, 304 U.S. 583; *Imholte* v. *United States*, 226 F.2d 585, 590-591 (C.A. 8), *Sherwin* v. *United States*, 320 F.2d 137, 148-151 (C.A. 9), certiorari denied, 375 U.S. 964; *Roper* v. *United States*, 54 F.2d 845, 847 (C.A. 10); *Elbel* v. *United States*, 364 F.2d 127, 134 (C.A. 10), certiorari denied, 385 U.S. 1014. In the instant case, as in *Sherwin*, the jury was emphatically charged on the distinction between wilful fraud and negligent or careless oversight (*supra*, pp. 5-6). In these circumstances we are unable to see how the court's charge could somehow have given the jury the idea that the burden of proof on the issue of intent had been shifted from the prosecution to the defense. The only question here was whether, when he filed the false tax return, petitioner knew it was false. The jury instructions did not permit the jury to substitute a rule of law for solid proof on that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 323

J. D. MCCARTY,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

JURISDICTION

The Petition for Writ of Certiorari filed in this case was air expressed from Oklahoma City, Oklahoma, by the printing company at about 2:30 p.m., on July 2, 1969, for delivery to the Clerk of this Court on July 3, 1969. This was well in advance of the July 5, 1969, due date.

On July 8, 1969, a deputy clerk of the Court notified counsel for the petitioner that the petition was being held for filing pending receipt of the certified record of the Court of Appeals for the Tenth Circuit. Telephone conversation, to the Clerk of the Court of Appeals, revealed that a judicial conference in Denver had curtailed work in the office of the Clerk, but the record was forwarded immediately thereafter.

In the initial conversation with the deputy clerk of this Court the deputy clerk indicated that further delay in docketing the petition (i.e., waiting for receipt of the record) was of no consequence since it was not a jurisdictional matter anyway.

Doubtlessly the intervening Memorial Day Holiday caused delay and confusion in the handling of the petition and the presumption could fairly lay that the air express company delivered the petition to the control of this Court on June 3, 1969, as scheduled.

ARGUMENT

The Brief submitted by the Solicitor General in opposition to J. D. McCarty's Petition for a Writ of Certiorari is directed primarily to justifying the following instruction to the McCarty jury:

> "As a general rule, it is reasonable to infer that a person ordinarily intends all of the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> "So unless the evidence in this case leads the jury to a different or a contrary conclusion, the jury may draw the inference and find that the accused intended all of the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any acts knowingly done or knowingly omitted by the accused. [R. 871-872.]"

In support of this argument, the Solicitor General relies most heavily upon the case of *Sherwin* v. *United States*, 1963, 320 F.2d 177 (C.A.9.) In further rationaliz-

ing the case of *Mann* v. *United States*, 319 F.2d 404 (C. A. 5), and this Court's contemporaneous denial of certiorari in both *Sherwin* and *Mann*, despite dissimilar results the Solicitor General states:

> ". . . While the government filed a protective petition in *Mann, it* basically opposed certiorari, on the ground that the correctness of the charges depend so heavily upon the evidence introduced at the trials that there was neither necessary inconsistency in the rulings nor prospect that review in this Court would give further guidance to lower courts. Both petitions were denied.[4] (Footnote omitted)"

Although the Solicitor General is able to distinguish the facts of *Sherwin* and *Mann* and thereby justify the need for different instruction in each, there seems to be a failure to distinguish the facts of *Sherwin* and the instant case in regard to instruction requirements.

In the instant case, not one act of fraud or concealment was proved. The only proof to support conviction was the fact of underreporting income, without any independent proof of an act colored with fraud or concealment such as to justify or support an inference or presumption of criminal intent to defeat the payment of a tax. In the *Sherwin case*, the agent testified that the accused stated that he had only two bank accounts. Sherwin's statement to the agent was proven to be false when the evidence showed that he had at least five other bank accounts, some of which were in fictitious names. ALSO, the unreported receipts were found in the bank accounts not disclosed to the agent.

The distinction which the Petitioner seeks to reveal to this Court is the one between cases in which there is merely proof of underreported income and those in which there are overt acts which, independently of the amount of income reported, bear the color of fraud and bespeak of a criminal intent. This distinction was never more thoroughly understood than by the Court of Appeals for the Seventh Circuit when it stated on rehearing in the case of *Hibbard* v. *United States*, 172 Fed. 66, 73:

> "On Rehearing.
>
> "PER CURIAM. The petition for rehearing is denied. We do not wish, however, that there should be any misunderstanding respecting our holding on the instruction referred to in subdivision 5 of the opinion. Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error consists in applying it to a case wherein, apart from intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven. The instruction as given (bearing in mind the case to which is was applied), though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error."

Hibbard v. *United States* was a mail fraud case and the instruction spoken to above appeared at page 71 of the opinion and was as follows:

> "The law presumes that every man intends the natural, legitimate and necessary consequences of his

acts. Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the acts determines the complexion of the intent. The intent to injure or defraud may be presumed upon an unlawful act which results in loss or injury, if proven to have been knowingly committed."

The crime of willfully evading or defeating tax requires proof of specific intent in order to support a conviction. The Oklahoma Court of Criminal Appeals in its recent opinion in *McFay* v. *State*, Vol. 40 Okla. Bar Ass'n Journal, page 1758, August 2, 1969, reviewed the Oklahoma law on proof of specific intent to commit a crime and therein stated:

"This court said in the case of *Ogelsby* v. *State*, Okl. Cr. 411 P.2d 974:

> 'A specific intent is not presumed and conviction cannot be had on the basis of an imputed intent. The general rule, that a criminal intention will be presumed from the commission of the unlawful act does not apply. No intent in law or mere legal presumption differing from the intent in fact, can be allowed to supply the place of proof of the requisite specific intent. 22 C.J.S. Criminal Law, § 32.

Also, in the case of Sullateskee v. State, Okl. Cr. 428 P.2d 736:

> 'In a case wherein specific intent is an element of the crime charged, it is necessary for state to prove such specific intent as an independent fact.'

They said further:

> 'It is incumbent upon the State to prove every essential element of the crime charged by evidence beyond a reasonable doubt, and a conviction based upon evidence which raises merely suspicions will not be allowed to stand.'"

The opinion of the Court of Appeals for the Tenth Circuit and the response of the Solicitor General both champion the view that the instruction complained of did not constitute plain error and that any deficiencies in the instruction short of fundamental error were waived. This, however, in view of a total lack of independent proof of criminal intent, as is required by both the United States decisions and the Oklahoma decisions cannot be reconciled with Rule 52 (b) F.R. Crim. P., as it speaks of defects affecting substantial rights:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Respectfully submitted,

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September, 1969